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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. EP 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

REPLY OF THE ASSOCIATION OF AMERICAN RAILROADS TO THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE'S PETITION FOR RULEMAKING

Of Counsel:

Paul A. Guthrie
J. Michael Hemmer
Paul R. Hitchcock
James A. Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
John P. Patelli
David C. Reeves
Patrick Riley
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Greg E. Summy
Gayla L. Thal
Richard E. Weicher
W. James Wochner

Louis P. Warchot
Association of American Railroads
425 3rd Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Frederick J. Horne
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6486

Counsel for the Association of
American Railroads

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The Association of American Railroads ("AAR") opposes the Petition for Rulemaking of the National Industrial Transportation League ("NITL") filed on July 7, 2011 in this docket ("NITL Petition"). The NITL Petition does not warrant special consideration in a separate rulemaking. The Board should treat the NITL Petition, which proposes to replace portions of the Board's competitive access rules with a new switching regime, as part of the record in Ex Parte No. 705, *Competition in the Railroad Industry*. The Board should proceed with the orderly consideration of the record it developed in Ex Parte No. 705 rather than institute a new proceeding on the basis of the NITL Petition.

INTRODUCTION

The Board initiated Ex Parte No. 705 to provide "a public forum to discuss access and competition in the rail industry, and with a view to what, if any, measures the Board can and should consider to modify its competitive access rules and policies."[1] In written comments and in oral testimony at the June 22-23, 2011 hearing, numerous parties presented a wide range of views on those issues. The NITL Petition was filed while the record in Ex Parte No. 705

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[1] *Competition in the Railroad Industry*, STB Ex Parte No. 705, slip op. at 5 (served Jan. 11, 2011) ("*EP 705 Notice*").

remained open, and the Board could treat it as a supplemental comment in that proceeding. The Board should not allow the NITL Petition to distract from the orderly consideration of the record it developed in Ex Parte No. 705. The NITL Petition is merely one of several proposals presented in Ex Parte No. 705 for expanded rail regulation.

AAR's comments and testimony in Ex Parte No. 705 demonstrated that no changes to the Board's competitive access regulations are needed or justified. No reliable evidence submitted in Ex Parte No. 705 showed the need for any changes to the current access rules. None of the advocates of change acknowledged the adverse impact on rail revenues and operations that would result from expanding involuntary access. Nor did advocates of change explain why any valid concerns about rising rail rates could not be addressed through modifications to the Board's existing maximum rate procedures. But if the Board were to conclude that changes to its access rules merit further consideration, it should develop an agenda based on the complete record in Ex Parte No. 705, not the selective excerpts used in the NITL Petition.

Indeed, the NITL Petition could not stand on its own as a predicate for agency action. The NITL Petition is manifestly incomplete because it fails to address the critical issue of access pricing, which would be an essential element of any new rules regarding involuntary access. The NITL Petition also fails to address other important access-related issues discussed in the record in Ex Parte No. 705, including how any new rules would apply to various categories of traffic, including TIH traffic. In short, like other proposals made by shippers in Ex Parte No. 705, NITL's proposal is not sufficiently concrete to provide a valid basis for issuance of a NPRM.

Apart from its incompleteness, the NITL proposal suffers from many of the same substantive flaws as other proposals for expanded involuntary access advanced by shippers in Ex Parte No. 705. Despite NITL's characterization of its Petition as "limited" and a "middle

ground," the switching proposal amounts to a scheme of access on demand for many shippers served by a single railroad. It eschews conduct-based standards and instead would grant access based on conclusive presumptions of market power that in fact have nothing to do with market power and that are readily subject to manipulation by shippers. The proposal would go so far as to compel switching even in the extreme circumstances where rates are well below the Board's jurisdictional threshold for rate review. The result would be precisely the sort of radical restructuring of the railroad industry that the courts have said may not be accomplished under the existing statutory scheme.

Thus, it would not be appropriate for the Board to allow the NITL Petition to distract from consideration of the full record in Ex Parte No. 705. Nor does the NITL Petition provide a sensible foundation for pursuing the issues raised in Ex Parte No. 705.

I. NITL's Petition Merely Rehashes Arguments Already Made by Proponents of Changes in the Rules in Ex Parte No. 705

The NITL Petition is largely a rehash of positions already advanced by other shipper commenters in Ex Parte No. 705 and ignores the problems with those positions that have been noted by the railroads and other parties. NITL adds nothing to the factual record developed in Ex Parte No. 705. The Board should not accord the NITL proposal special consideration to the exclusion of the numerous other proposals, issues and concerns raised by the participants in Ex Parte No. 705 simply because NITL served up its proposal as a separate rulemaking petition just as the record was closing in Ex Parte No. 705. Any consideration of NITL's Petition should occur in the context of the Ex Parte No. 705 record as one of many proposals for change.

Much of the NITL Petition is a discussion of legal arguments that allegedly support a change to the existing treatment of switching under the competitive access regulations. *See* NITL Petition at 10-28. NITL's discussion of these issues in its Petition adds nothing to the

record already developed by other parties in Ex Parte No. 705, most notably the so-called Interested Parties in whose opening and reply comments NITL joined.[2] NITL's basic argument is that Congress intended that reciprocal switching be used by the ICC and the Board to create artificial intramodal competition for sole-served shippers, but the access rules adopted by the ICC undermined that goal by requiring proponents to show competitive abuse. *See* NITL Petition at 10-16. As explained in detail in AAR's Ex Parte No. 705 Reply Comments, Congress did not intend that reciprocal switching be used to restructure the railroad industry to provide multi-carrier service for sole-served shippers. The ICC properly concluded that the access provisions in the statute should be used to address anticompetitive railroad conduct, not as a tool to restructure the industry.[3] None of the parties in Ex Parte No. 705 identified a conduct-based standard for competitive access that could be a possible substitute for the current competitive abuse standard under the existing rules and NITL does not propose one in its Petition.

NITL's Petition also repeats the argument made by several shipper commenters in Ex Parte No. 705 that the Board has broad authority to revise its competition policy to adopt open-access regulations. *See* NITL Petition at 16-24.[4] But like the other shipper commenters that made this argument, NITL badly overshoots the mark on the subject of agency discretion. The Board's existing competitive access rules were adopted because they implemented Congress'

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[2] Joint Comments of Alliance for Rail Competition, the American Chemistry Council, *et al.*, *Competition in the Railroad Industry*, STB Ex Parte No. 705 (filed Apr. 12, 2011) ("Interested Party EP 705 Comments"); Joint Reply Comments of Alliance for Rail Competition, the American Chemistry Council, *et al.*, *Competition in the Railroad Industry*, STB Ex Parte No. 705 (filed May 27, 2011) ("Interested Party EP 705 Reply Comments").

[3] Reply Comments of AAR, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 28 (filed May 27, 2011) ("AAR EP 705 Reply Comments").

[4] *See also, e.g.*, Reply Comments of Arkansas Electric Cooperative Corporation, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 5-7 (filed May 27, 2011); Reply Comments of Concerned Captive Coal Shippers, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 11-35 (filed May 27, 2011); Interested Party EP 705 Comments, at 32-35.

desire to deregulate transportation markets while protecting shippers against abuses of market power. The Board could not disregard this Congressional intent by modifying the existing rules so they could be used as a tool for the broad restructuring of the railroad industry.

All of NITL's legal arguments suffer from a fundamental misunderstanding – or distortion – of what Congress understood it was doing in enacting the deregulatory, market-based approach to rail pricing embodied in the Staggers Act and reinforced in ICCTA.[5] Congress wanted rail rates to be responsive to the forces that exist independent of regulatory action in the marketplace. That is what the policy of "allow[ing], to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" means. 49 U.S.C. § 10101(1). The competition between railroads that exists in the marketplace is sustainable competition. Where rail carriers have agreed to switch traffic for one another, they have done so on terms and for reasons that they find to be mutually beneficial.

NITL reads the Staggers Act as calling for switching arrangements that are neither voluntary nor sustainable. It seeks to compel carriers to grant access they would not have agreed to at prices that are not specified but that NITL undoubtedly wants to be artificially low. The Staggers Act plainly did not contemplate such an expansive and potentially destructive use of involuntary access. The current regime accounts for the "access," "competition," and other sustainable benefits that Congress wanted when it sought a balance between the deregulation of transportation markets and protection of shippers against the abuse of market power. Congress has not authorized a new or different balance.

Significantly, NITL mischaracterizes the record in describing the alleged support for changes to the existing rules. NITL incorrectly states that the Christensen Report concluded that

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[5] Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980) ("Staggers Act"); ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

expanding reciprocal switching "would not harm the railroads." NITL Petition at 28. The Christensen Report reached no such conclusion. In fact, as explained by Drs. Eakin and Meitzen of Christensen Associates in a statement submitted to the Board in support of AAR's Reply Comments in Ex Parte No. 705, the Christensen Study did not even consider whether an expansion of reciprocal switching would harm railroad operations.[6] Testimony from railroad witnesses explains that involuntary switching would result in serious adverse effects on rail operations and service.[7] The Christensen analysis of reciprocal switching also "was performed under the assumption that the terms of access reflected voluntary negotiations between railroads" which is certainly not what the NITL proposal envisions.[8]

NITL notes that the Railroad-Shipper Transportation Advisory Council ("R-STAC") recommended broadened access remedies. NITL Petition at 30. NITL fails to point out that the R-STAC also warned that expansion of access remedies would "require[] consideration of the operational impacts and the financial implications to carriers."[9] While attempting to create the impression that R-STAC's white paper represents broad industry support for expanded reciprocal switching, NITL also fails to point out a critical fact that the Board well knows: the Class I railroads that would be directly affected by NITL's reciprocal switching proposal are not voting members of R-STAC.

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[6] AAR EP 705 Reply Comments, Verified Statement of B. Kelly Eakin and Mark E. Meitzen, at 3 ("Eakin/Meitzen V.S.").

[7] Opening Comments of Norfolk Southern Railway Company, Verified Statement of Mark D. Manion, *Competition in the Railroad Industry*, STB Ex Parte No. 705 (filed Apr. 12, 2011) ("Manion EP 705 V.S."); Comments of Union Pacific Railroad Company, Verified Statement of Lance M. Fritz, *Competition in the Railroad Industry*, STB Ex Parte No. 705 (filed Apr. 12, 2011) ("Fritz EP 705 V.S.").

[8] Eakin/Meitzen V.S. at 11.

[9] Railroad-Shipper Transportation Advisory Council, *White Paper on New Regulatory Changes for the Railroad Industry*, at 2 (Oct. 16, 2009).

II. The NITL Proposal Suffers from Multiple Deficiencies that Make it Entirely Unacceptable as the Basis for Proposed Rules Addressing Involuntary Switching

NITL attempts to portray its switching proposal as a "balanced system," but the proposal is anything but balanced – its only purpose is to benefit shippers that are currently served by a single rail carrier by providing access for a second carrier that would force rates down. As a procedural matter, the proposal is obviously incomplete and therefore does not provide a coherent basis for a proposed rule. It fails even to address the critical issues of access pricing, adverse impacts on rail revenues, and adverse impacts on rail service and investment in rail infrastructure. NITL also fails to explain whether its proposal is intended to supplant some or all STB rate regulation and, if so, whether that would be lawful. The proposal is also severely flawed as it fails to address the application of the proposed rule to contract movements, exempt traffic, and TIH/hazmat shipments. As a substantive matter, NITL's proposal constitutes an impermissible attempt to restructure the railroad industry.

The following subsections are not exhaustive, but address some of the more glaring defects in NITL's proposal.

A. NITL's Proposal Is Fatally Incomplete Because it Completely Ignores the Issue of Access Pricing

In its original Notice instituting Ex Parte No. 705, the Board stated that "[i]f the Board were to modify its competitive access rules, it would also need to address the access price." *EP 705 Notice* at 7. NITL presents a broad proposal to modify the Board's competitive access rules, but says nothing whatever about access pricing. For this reason alone, its proposal is fatally defective.

NITL obviously recognizes the central role that access pricing would play in any serious proposal to modify the Board's access rules. It stated in its opening comments in Ex Parte No. 705 that "[e]ven if reciprocal switching arrangements can be established more broadly, the level

of the switching rate remains a serious issue."[10] NITL claims that its petition "provides the Board with not just a concept, but an actual proposal, including regulatory language that would replace the rules currently set forth at 49 C.F.R Part 1144 for reciprocal switching." NITL Petition at 6. But there is no access pricing provision in NITL's proposal or its proffered "regulatory language."

NITL's failure to address access pricing in its proposal is particularly surprising given NITL's reliance on Christensen and Associates as supposed proponents of reciprocal switching. NITL badly distorts what Christensen has to say about reciprocal switching and also overlooks Christensen's very specific observations regarding access pricing.[11] As explained by Drs. Eakin and Meitzen in testimony to the Board in Ex Parte No. 705, "the determination of access rates is a critical component of any open access policy." Eakin/Meitzen V.S. at 13. While "the determination of access rates is far from a settled issue in regulatory applications, and the method employed has significant implications for the end result," *id.* at 14, the NITL proposal ignores the issue altogether.

B. NITL Fails to Address the Adverse Impacts of its Proposal on Investment in the Rail Network and on Rail Service and Operations

The Board's initial Notice in Ex Parte No. 705 made it crystal clear that the Board expected proponents of involuntary access to address the potential impacts of their proposals. *EP 705 Notice* at 7. ("Any party advocating a change should address these impacts.") NITL's Petition entirely ignores the subject of impacts.

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[10] Comments of the National Industrial Transportation League, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 14 (filed Apr. 12. 2011) ("NITL EP 705 Comments").

[11] *See generally* Eakin/Meitzen V.S. at 11-17.

NITL's proposal would potentially apply to large numbers of shippers served solely by one railroad. It was no doubt crafted with that goal in mind. The objective of the proposal is to drive down rail rates through mandatory access. The potential magnitude of the reduction in revenues, and the impact of that reduction on investment in the rail network, is enormous.[12] Railroads would be deprived of funds that would otherwise be invested in the network and investors would be deterred from investing in railroads. These effects are directly contrary to the public interest in a viable rail transportation network that has the capacity to meet increasing demand for service. NITL's failure even to address the impact on railroad investment is a major omission.

NITL also entirely ignores the impact of its proposal on rail operations and service. The record in Ex Parte No. 705 contains extensive and essentially uncontested evidence on the adverse effects on rail operations that can be expected to flow from involuntary access.[13] It is irresponsible and short sighted to propose a regulatory regime that would undermine the quality of rail service.

C. The NITL Proposal Is Unlawful, as it Would Result in a Prohibited Restructuring of the Rail Industry

As a substantive matter, NITL's proposal disregards Congress' intent that the competitive access provisions in the statute are not to be used to restructure the railroad industry. NITL purports to separate itself from the other shipper proposals by claiming that its proposed access rules fall short of open-access and are therefore a "middle ground position" that would be

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[12] In Ex Parte No. 705, AAR witness William Rennicke calculated that, if rates for all traffic subject to regulation were reduced to 180% of variable costs by forced access, the railroad industry would lose $5.2 billion annually in revenue. Initial Comments of AAR, Verified Statement of William J. Rennicke, *Competition in the Railroad Industry*, STB Ex Parte No. 705, at 19 (filed Apr. 12, 2011).

[13] *See, e.g.*, Manion EP 705 V.S.; Fritz EP 705 V.S.

consistent with the statute. In fact, NITL's proposal, through the use of conclusive presumptions rather than conduct-based standards, would create the possibility of access on demand through reciprocal switching for a broad class of rail customers served only by one railroad. This is no middle ground, but rather a roadmap for aggressive restructuring of the industry. It is based on little more than the shippers' desire to have multiple rail options where they now have only one rail transportation provider.

NITL claims that its proposal is moderate because it assertedly compels reciprocal switching only when the incumbent railroad has "market power." NITL Petition at 36. The existence of market power is not in itself a conduct-based standard that would justify an access remedy nor is it referenced in NITL's proposed rule. Moreover, the "conclusive presumptions" proposed by NITL would effectively result in broad grants of access without any consideration of market power.

NITL proposes a conclusive presumption that there is no effective intermodal or intramodal competition where "the Landlord Class I carrier has handled 75% or more of the freight volume transported for a movement for which competitive switching is sought in the twelve months prior to the petition seeking switching." NITL Petition at 8.[14] The 75% presumption says nothing about market power because many railroads win the majority of the traffic, and often over a 75% market share, by competing via superior service or pricing. If a railroad successfully competes for a shipper's business, it makes no sense to regulate the railroad as a result of its marketplace success. The 75% presumption is also arbitrary because a shipper could manipulate the railroad's market share simply by arranging for 75% of its traffic to be

[14] NITL's reference to the incumbent railroad as a "Landlord" may be intended to suggest that railroads are or should be in the business of renting their facilities to competitors. Use of the term is misleading here. Railroads own their facilities to serve their customers, not as property to be used by others.

handled by the incumbent railroad for a year. Moreover, the 75% presumption would apply regardless of the level of rates that the railroad has charged – even if the rates are substantially below the jurisdictional threshold – and regardless of the quality of service.

The alternative 240% R/VC presumption proposed by NITL does not signify the existence of market power either. As the Board's Christensen Study concluded, R/VC ratios say little or nothing about the existence of market power.[15] Moreover, the statue makes clear that the fact that a rate yields an R/VC ratio greater than 180 percent of variable costs does not establish a presumption that the carrier setting that rate has market dominance over the traffic or that the rate is unreasonable. 49 U.S.C. § 10707(d)(2). A rate level of 240% R/VC may or may not be reasonable, but under NITL's proposal, there would be no test of a rate's reasonableness. Instead, the 240% R/VC would effectively operate as a rate cap. NITL's proposal, therefore is simply a mechanism for reducing rate levels without recourse to the statutory rate reasonableness standards and procedures. The competitive access provisions of the statute do not authorize the Board to impose rate caps. Nor are they to be used as "an alternative means of obtaining rate relief." *Midtec Paper Corp. v. United States*, 857 F2d 1487, 1502 (D.C. Cir. 1988) ("*Midtec*").

NITL's conclusive presumptions are an impermissible short-cut around conduct-based standards for granting competitive access. NITL would make reciprocal switching available for a broad class of solely served shippers without any showing that the incumbent railroad has engaged in anticompetitive conduct, or even a showing under a lesser burden of proof as

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[15] LAURITS R. CHRISTENSEN ASSOC., INC., A STUDY OF COMPETITION IN THE U.S. FREIGHT RAILROAD INDUS. & ANALYSIS OF PROPOSALS THAT MIGHT ENHANCE COMPETITION: REVISED FINAL REPORT ES-5 (2009) ("The ratio of revenue to URCS variable cost (R/VC) is weakly correlated with market structure factors that affect shipper 'captivity,' and is not a reliable indicator of market dominance").

originally advocated by NITL in its opening comments in Ex Parte No. 705.[16] A regulatory regime that provided for widespread transformation from single railroad service to two railroad service would be impermissible because it would represent a significant restructuring of the industry of the same sort that the *Baltimore Gas & Electric*[17] and *Midtec* courts disallowed.

Midtec directly addressed the availability of reciprocal switching under circumstances similar to those provided for in NITL's proposed rule. The court confronted what it understood to be an effort to obtain reduced rates through mandated reciprocal switching instead of through a rate-reasonableness proceeding and categorically rejected the notion that switching could be ordered simply based on rate levels or because a shipper is sole-served. According to the court, Midtec's argument was "predicated upon the theory that its 'captive status' 'subjects it to serious service and rate disabilities.'" 857 F.2d at 1503. Midtec's proffered solution to its difficulty was a regulatory grant of reciprocal switching, which "was intended to be an alternative means of obtaining rate relief, requiring the Commission affirmatively to move the national rail system toward a regime more like perfect competition, with the attendant benefits of marginal cost ratemaking." *Id.* at 1505.

The court rejected Midtec's implicit assumption "that a carrier's ability to charge a captive shipper rates above the levels that would obtain if additional carrier service were introduced offends the competition policies of the Staggers Act." *Id.* "[T]hat proposition is inconsistent with Congress's intent to deregulate railroad ratemaking in the absence of a market

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[16] In Ex Parte No. 705, NITL did not take issue with the need for a party to satisfy a conduct-based standard in order to be entitled to a grant of access. Rather, NITL asserted that "the Board must simplify the burdens of proof that are currently required to establish reciprocal switching and align them more closely with the statute's public interest requirements." NITL EP 705 Comments, at 12.

[17] *Baltimore Gas & Electric v. United States*, 817 F.2d 108 (D.C. Cir. 1987) ("*Baltimore Gas & Electric*").

dominant carrier." *Id.* at 1505-06. According to the court, it would also be inconsistent with the statute "to conclude that a carrier whose rates do not bespeak market dominance is nonetheless subject to access regulation merely because those same rates are supra-competitive." *Id.* at 1506. The court was unwilling to accept "the improbable conclusion that Congress contemplated that a market could be both 'effectively competitive' so as to preclude direct rate regulation, and yet insufficiently competitive to require indirect rate regulation through compelled competitive access." *Id* at 1507. The court concluded that the relief demanded was not permitted under the statute:

> If the Commission were authorized . . . to prescribe reciprocal switching or terminal trackage rights whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition.

Id.

NITL's proposal clearly runs afoul of *Midtec* both because NITL is attempting to circumvent the rate-reasonableness provisions of the statute and because NITL would provide mandated switching simply because a shipper is served by a single railroad.

Baltimore Gas & Electric, in which the court confronted a broad attack on the ICC's "decision to prescribe through routes and joint rates, and establish switching arrangements, *only* to remedy or prevent 'anticompetitive' acts," 817 F.2d at 114, confirms that the NITL proposal is not consistent with the statute. The court faced demands similar to those made here, backed by arguments similar to those made here, and rejected them. In that case, the court understood the shippers' demand to be that the court "direct the ICC to return to its old regulatory regime, by prescribing through routes on all possible combinations of tracks between all points." *Id.* In addition, shippers proposed that rates would be capped at "the 'fully allocated cost of providing

the service' – a figure that would apparently include the variable costs incurred as a result of use of the facilities, a share of overall maintenance and operating expenses, and a component for return on investment." *Id.* The shippers argued that "[c]ompetition would most efficiently influence rates . . . if all railroads could, by way of through routes, benefit from all of each other's tracks and facilities." *Id.* at 114-15.

The details of NITL's proposal differ from what the shippers were advocating in *Baltimore Gas & Electric*, but not in any way that matters. Like the BG&E shippers, NITL seeks to restructure rail markets through regulatory action compelling involuntary access. The BG&E court found "not the slightest indication that Congress intended to mandate a radical restructuring of the railroad regulatory scheme" as proposed by BG&E, and the same applies here. *Id.* at 115.

As NITL acknowledges, its proposal is similar to the Canadian interswitching regime, which gives shippers automatic access to a second rail carrier under certain conditions and imposes no conduct-based standard to determine eligibility for an access remedy. But NITL *itself* recognized in its initial comments in Ex Parte No. 705 that such a regime could not be implemented in the United States without a change in the governing statute: "The League is cognizant that the Canadian switching model could not be adopted wholesale in the United States, based on our current statutory structure, and it does not advocate for switching rules that replicate the Canadian system verbatim."[18] This prior admission underscores the fact that NITL's proposal is not supported by the existing statute.

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[18] NITL EP 705 Comments, at 13. The NITL Petition is actually more expansive than Canadian interswitching. For example, while interswitching in Canada generally is required within 30 *kilometers*, NITL would substantially expand the distance to 30 *miles* and would apparently permit an order for switching beyond that distance if the distance were "reasonable." Moreover, the proposed text of NITL's rule makes clear that NITL is seeking to give shippers

Congress knew when it adopted the current statute that some shippers are served by only one railroad, and it knew that those sole-served shippers may not always have effective intermodal alternatives. This is the reality of rail markets and it contributes to the difference in demand among rail shippers for rail service. Congress did not intend that the ICC or the Board use the access provisions of the statute to restructure the railroad industry so as to provide multiple rail options to these sole-served shippers.

D. The NITL Proposal Is Contrary to Congressional Policy to Minimize the Role of Federal Regulation in the Rail Transportation Industry

Various shipper participants in Ex Parte No. 705 argued disingenuously that their pleas for involuntary access were deregulatory in nature rather than proposals for new regulation. Given the elements of its proposal, NITL obviously cannot make that claim. In fact, NITL acknowledges that its proposal would "establish a new regulatory regime." NITL Petition at 1. Under this regime, access through switching by a second carrier would potentially be available without any conduct-based showing to many, many shippers, but the actual grant of access would occur only after a regulatory proceeding before the Board. These proceedings would entail considerable expense and burden. The institution of this regime would be contrary to the Congressional goal to minimize federal regulatory control over the rail industry.

CONCLUSION

Before the Board considers taking any further action on rail competition matters, it needs to sort through the comments and proposals submitted in Ex Parte No. 705, including the many comments by parties opposed to any change to the current balanced regulatory scheme. NITL's proposal should be accorded no special status in that review of the record. NITL's proposal

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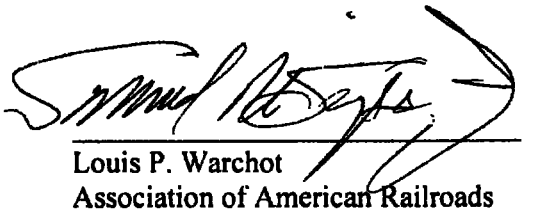
the ability to designate interchanges, as it does not restrict switching operations to terminal areas but instead measures the "reasonable distance" to "an interchange between the Class I rail carrier serving such shipper . . . and another rail carrier." NITL Petition at 68.

should be treated by the Board as for what it is – one of several proposals submitted in Ex Parte No. 705 for changes in the existing rules, all of which suffer from fundamental flaws. If the Board concludes that any further consideration of some form of regulatory change in conformance with the multiple criteria identified by the Board in the *EP 705 Notice*, including the public interest, is appropriate, the Board should proceed based on an orderly consideration of the record it developed in Ex Parte No. 705. The Board should not issue an NPRM in response to NITL's Petition.

Respectfully submitted,



Louis P. Warchot
Association of American Railroads
425 3rd Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Frederick J. Horne
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6486

Counsel for the Association of American Railroads

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